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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE THOMAS J. WHELAN)

UNITED STATES OF AMERICA, Plaintiff, v. TOMAS SANTILLANES-LOPEZ, Defendant.	Case No.: 07cr3108-W Date: April 1, 2008 Time: 2:00 p.m. **DEFENSE'S REPLY TO GOVERNMENT'S RESPONSE AND OPPOSITION TO MOTIONS TO:** **(1) DISMISS THE INDICTMENT FOR FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY PANEL; AND** **(2) COMPEL DISCOVERY.**

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY; AND
WILLIAM COLE, ASSISTANT UNITED STATES ATTORNEY:

Mr. Santillanes-Lopez files the instant reply to the government's arguments that the Court should deny his motions to dismiss for failure to present exculpatory evidence and compel discovery. See Gov't Mar. 25, 2008 Resp. (Gov't Resp.") to Def.'s Mar. 18, 2008 Mot. ("Def.'s Mot.").

I.

ARGUMENT

A. *United States v. Williams* Does Not Impact the Government's Obligation to Present Exculpatory Evidence to the Grand Jury.

The government argued that the Supreme Court's decision in United States v. Williams, 504 U.S. 36 (1992), is dispositive of whether it must present exculpatory evidence to the grand jury. It would be difficult to imagine a less relevant precedent; Williams was premised upon the lack of a statutory mandate to support the exculpatory evidence rule, while Mr. Santillanes-Lopez's motion is based upon precisely the authority lacking in Williams. Here, the State of California has promulgated a rule requiring disclosure of exculpatory evidence and Congress has incorporated that rule. Thus, Williams is distinguishable.

Because Williams expressly acknowledged legislative authority to regulate grand jury practice, see id. at 55, it should be of great consequence to this Court in deciding the issue that the California state legislature saw fit to draft and enact just such a disclosure requirement. See Cal. Penal Code § 939.71(a). Congress has applied this rule, among others, to federal prosecutors. See 28 U.S.C. § 530B(a) (applying State rules to attorneys in federal court within the State jurisdiction). Section 530B was enacted in late 1998, while § 939.71(a) was codified in mid-1997. Congress, thus, is presumed to enact new law with knowledge of existing statutes. See Whitfield v. United States, 543 U.S. 209, 216 (2005) ("Congress is presumed to have knowledge of the governing rule"); see also Williams v. Taylor, 529 U.S. 420, 434 (2000) (same). Section 939.71(a) placed an affirmative, and mandatory duty, upon the prosecutor to present exculpatory evidence it is aware of to the grand jury. Id. (Section 939.71(a) states that the prosecutor "*shall* inform the grand jury of its nature and existence"). Despite the government's repeated claim that it is under no legal obligation to present exculpatory evidence to a federal grand jury panel when seeking an indictment, it cites no case law permitting it to act without regard to the enactment by the California state legislature.

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In fact, the United States Attorneys' Manual, too, provides precisely what the California legislature does in remarkably similar language.

9-11.233 Presentation of Exculpatory Evidence

> In United States v. Williams, 112 S. Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

Available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.233.

Further 22 C.F.R. § 77.3, which is entitled "Application of 28 U.S.C. 530B," provides:

> In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities *to the state rules and laws, and* federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(emphasis added). The express command to conform conduct "to the state rules and laws" in addition to federal ones disposes of the government's argument that § 939.71(a) only applies to state grand juries. If that logic dictated, there would be no discernable need for either the federal regulation of even the statute.

In light of the foregoing arguments Mr. Santillanes-Lopez believes that the prosecution was required by federal law - § 530B(a) - as well as state law to have disclosed exculpatory evidence of duress. The prosecution plainly possessed such information, but failed to present it.

In addition to its wholesale reliance upon Williams in opposition to Mr. Santillanes-Lopez's motion, the government also argues that no inquiry by the Court is necessary because Mr. Santillanes-Lopez failed to support his claim, i.e., insufficient facts have been presented to create a factual controversy. The government, apparently, relies upon the local rule's declaration requirement at Southern District Local Rule 47.1(g). Conveniently, the government ignores the governmental report generated in the 2002 case that was attached as Exhibit B to Mr. Santillanes-Lopez's moving papers, which creates and confirms a factual controversy - that the post-arrest statements of duress in 2002 were true and therefore exculpatory, then and now - giving rise to his motions. See Def.'s Mot. at Exhibit B.[1] That report explained how, subsequent to his arrest for identical conduct at issue in this case, the Federal Bureau of Investigations administered a polygraph examination "to determine the validity of the statements [Mr. Santillanes-Lopez] had made to" arresting agents. Id. Those statements detailed his driving a vehicle with cocaine to the San Luis, Arizona, Port of Entry only because several men threatened to "kill his son Tomas," which he believed they could and would do if he refused. See August 20, 2002 Report of Investigation by Special Agent Joseph W. Consavage (attached as Exhibit C hereto). Agent Consavage's September 2002 report subsequently states that "based on the examination, the [FBI examiner concluded] the statements Santillanes had given were truthful." See Def.'s Mot. at Exhibit B. More crucially, Agent Consavage's September 2002 report stated: "*As a result of the polygraph examination*, all charges against Santillanes were dismissed, with prejudice, in the interest of justice on October 28, 2002." Id. (emphasis added). Thus, the report makes plain that the polygraph confirmed the existence of threats, providing a strong basis for a claim of duress, which prompted dismissal of all charges by the government's own motion. Id. at Exhibit A. If these documents are insufficient as the government alleges, defense counsel has attached a declaration hereto as Exhibit B discussing the facts giving rise to the government's own motion to dismiss the 2002 Arizona case. See Mar. 27, 2008 Declaration of Jason I. Ser ("Ser Dec.") (Attached as Exhibit D hereto); November 7, 2007 Report of Investigation by Special Agent Jeffrey J. Gilgallon (Attached as Exhibit E hereto). That declaration also noted the similarities between the 2002 case and the instant case, e.g., same compartment type and same men making similar threats. Id.

Should the Court choose to inquire, the government further contends that Mr. Santillanes-Lopez's "argument in the instant case that any polygraph examination 'confirmed the truth of his statement' is completely unsupported." Gov't Resp. at 6. This statement is consistent with ignoring the reports just discussed, which expressly contradict the government's current claim.

The government subsequently takes a step back and then argues that the results are unreliable (as opposed to unsupported) and, thus, inadmissible in federal court. Id. This is an evidentiary question, which

[1] Exhibit B is a copy of the September 29, 2002 Report of Investigation by Special Agent Joseph W. Consavage.

surely will be addressed by Mr. Santillanes-Lopez as trial approaches in future pleadings.[2] Nonetheless, it is worth pointing out that the government does not cite a single case for its over-broad proposition of complete inadmissibility. In fact, in United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997), the Ninth Circuit overruled its pre-Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993), per se ban on the admission of unstipulated polygraph evidence. Furthermore, the government's own FBI examiner interpreted the polygraph results and concluded Mr. Santillanes-Lopez was truthful. See Def.'s Mot. at Exhibit B. Thus, the polygraph was never "unstipulated" evidence. Obviously, evidentiary based exclusionary principle, have no application before a grand jury. See e.g., Costello v. United States, 359 U.S. 359 (1956).

The only question, under the legal argument herein, is whether this evidence constitutes "exculpatory evidence" under Cal. Pen. Code § 939.71(a).[3] It does, and the government's past actions confirm such an answer.

Significantly, the government never once claims to have offered the exculpatory evidence of duress present in this case, whether by way of the circumstances arising out of the 2002 case from Arizona or Mr. Santillanes-Lopez's own post-arrest statements in the instant matter. This is exactly what Mr. Santillanes-Lopez asserts should have happened. Thus, if that is the government's position, so be it and the issue becomes one of legal significance and no factual contest must ensue. See Local Rule 47.1(g)(1) (discussing how "opposition shall likewise be supported by a declaration which places [a predicate factual finding] into dispute"). Nonetheless, Mr. Santillanes-Lopez maintains his request for production of the grand jury transcripts pertaining to this case is proper and should be granted. See Fed. R. Crim. P. 6(e)(3)(E)(ii).

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[2] Mr. Santillanes-Lopez believes that, at the least, his statements at the polygraph examination are not only discoverable under Fed. R. Crim. P. 16(a), but relevant, admissible evidence at any future trial under several legal theories. See e.g., Fed. R. Evid. 801(d)(1)(B), 803(8)(B). The report by the FBI's examiner likewise is discoverable under Rule 16, as it will contain Mr. Santillanes-Lopez's statements, see Fed. R. Crim. P. 16(a)(1)(A)-(B), and constitutes Brady material. See Brady v. Maryland, 373 U.S. 83 (1963). Those results, too, are admissible at trial. See e.g., Fed. R. Evid. 801(d)(2), 803(8)(B).

[3] Mr. Santillanes-Lopez need not speculate as to whether the government could use incriminating polygraph results, which heretofore do not exist. Regardless, given the secrecy of the grand jury proceedings, it is unknown whether the government claimed the existence of incriminating polygraph results.

B. The Government's Reliability and Admissibility At Trial Arguments with Regard to Polygraph Evidence Are Misplaced as Neither Bears on Whether or Not the Materials Are Discoverable.

Although it claims a willingness to comply with its discovery obligations under Fed. R. Evid. 16 and Brady, the government discusses at length issues of reliability and admissibility pertinent to the polygraph materials. Not only is the argument premature, as neither reliability nor admissibility at trial are prerequisites for discovery, but it is legally misplaced.

The polygraph evidence is discoverable on at least two different bases. First, the materials by their nature contain Mr. Santillanes-Lopez's statements. See Fed. R. Evid. 16(a)(1)-(2). Second, they are Brady given the overlapping nature of the events leading to arrest in the 2002 Arizona case and the instant case. Both were prompted by the actions of the same men making the same types of threats against Mr. Santillanes-Lopez. See Ser Dec. They also show consciousness of innocence. Thus, the Court should order production of the polygraph materials or, alternatively, order their submission for in camera review.

The government takes the extreme and untenable position, given its acknowledgment of a possible duress defense being available, that it "need not provide discovery of potential impeachment evidence." Gov't Resp. at 14. The government is not given a blanket of protection from its discovery obligations by labeling evidence as impeachment material. See United States v. Vega, 188 F.3d 1150 (9th Cir. 1999).

Although reliability does not bear upon whether evidence is discoverable, Mr. Santillanes-Lopez notes the irony and convenience of the government's current claim that the FBI's polygraph results and the decision to dismiss by its sister office were somehow unreliable. Those findings and decisions also are possibly subject to principles of judicial estoppel. See e.g., Morris v. State of California, 966 F.2d 448, 453 (9th Cir. 1991) (the purpose of the doctrine is to protect the integrity of the judicial process); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) ("applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one."). More crucially, the government takes a legally unsound approach to excludability of polygraphs at trial: that they bear upon the ultimate issue of mens rea and thus are inadmissible under Fed. R. Evid. 704(b). See Gov't Resp. at 13. The Supreme Court indicates, subject to possible exceptions, to the contrary.[4] A

[4] Mr. Santillanes-Lopez is not waiving his right at trial to request an instruction that the government should have to disprove the existence of duress beyond a reasonable doubt, if such a defense is proffered.

"duress defense . . . may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." Dixon v. United States, 548 U.S. 1, 126 S. Ct. 2437, 2442 (2006). Thus, polygraph evidence, assuming admissibility, does not contravene Rule 704(b).

For these reasons, the Court should order production of the requested discovery.

II.

CONCLUSION

For these and all the foregoing reasons, the defendant, Mr. Santillanes-Lopez, respectfully requests that this court grant his motions and grant any and all other relief deemed proper and fair.

Respectfully submitted,

Dated: March 27, 2008

/s/ Jason I. Ser

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